

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

NATIONAL CITY BANK, N.A., and  
THE PNC FINANCIAL SERVICES  
GROUP, INC.,

Plaintiffs,

vs.

PRIME LENDING, INC., RONALD  
D. THOMAS, and JOHN DOES 1-  
20,

Defendants.

NO. 10-CV-0034-EFS

**SECOND AMENDED PROTECTIVE  
ORDER<sup>1</sup>**

Before the Court, without oral argument, are the parties' Joint Motion to Amend the Amended Protective Order, ECF No. 354, and related Motion to Expedite, ECF No. 355. On April 16, 2010, the parties filed a joint motion for entry of stipulated protective order. ECF No. 101. The Court granted the joint motion and entered the stipulated protective order. ECF No. 116. On September 24, 2012, the parties moved to amend the terms of the previously-entered Protective Order. ECF No. 316. The Court granted the motion and entered an Amended Protective Order on

<sup>1</sup> Consistent with the parties Joint Motion to Amend the Amended Protective Order, ECF No. 354, this Order amends and supersedes the Court's September 27, 2012 Amended Protective Order, ECF No. 320.

1 September 27, 2012. ECF No. 320. Now, the parties again jointly seek  
2 to amend the protective order to clarify the parties' responsibilities  
3 with respect to confidential materials at the conclusion of this  
4 litigation. ECF No. 354. The Court, having reviewed the pleadings filed  
5 in this matter, is fully informed and finds good cause to grant the  
6 motion.

7 Accordingly, **IT IS HEREBY ORDERED:**

- 8 1. The parties' Joint Motion to Amend the Amended Protective  
9 Order, **ECF No. 354**, and related Motion to Expedite, **ECF No.**  
10 **355**, are **GRANTED**.
- 11 2. Any material exchanged or obtained in discovery shall be used  
12 by the receiving party solely for the prosecution and/or  
13 defense of the lawsuit and for purposes of evaluation of  
14 settlement and for settlement negotiations, and not for any  
15 other purpose, including without limitation, any competitive  
16 or business purpose. Nothing contained herein shall restrict  
17 or prevent any party from disclosing or otherwise using any  
18 information or documents not obtained under this Order.
- 19 3. Any party may designate the information it produces as  
20 "CONFIDENTIAL" if it believes, in its good faith judgment, that  
21 the material contains confidential, sensitive or proprietary  
22 information that falls within the foregoing description of  
23 CONFIDENTIAL MATERIALS. The party shall make this designation  
24 by placing on every document or other material containing such  
25 information the legend "CONFIDENTIAL" prior to providing such  
26 document or other material or, if such method of designation

1 is not feasible by providing other written notice of such  
2 designation.

3 4. In the case of depositions, designation of the portion of the  
4 transcript, including exhibits, which contains "CONFIDENTIAL"  
5 information may be made by a statement to such effect on the  
6 record in the course of the deposition. All copies of  
7 deposition transcripts that contain material designated as  
8 "CONFIDENTIAL" shall be prominently marked "CONFIDENTIAL" on  
9 the cover thereof. Additionally, if depositions are conducted  
10 that involve "CONFIDENTIAL" information, each party shall have  
11 until fifteen (15) days after receipt of the deposition  
12 transcript within which to inform the other parties of the  
13 portions of the transcript (by specific page and line  
14 reference) to be designated "CONFIDENTIAL." If and when filed  
15 with the Clerk, the portions of such transcript marked or  
16 designated "CONFIDENTIAL" in accordance with this paragraph  
17 shall be filed under seal.

18 5. A higher level of protection shall be provided for highly  
19 sensitive documents, testimony, information, or other materials  
20 designated "ATTORNEYS' EYES ONLY." Access to documents,  
21 testimony, information and other materials designated  
22 "ATTORNEYS' EYES ONLY" shall be limited to persons listed in  
23 paragraphs 8(b)-(f) hereof, except: (i) as set forth in  
24 Paragraph 5 hereof; (ii) a party may show its own employees  
25 documents it designated as "ATTORNEYS' EYES ONLY"; or (iii) as  
26 agreed by the parties in writing (including by email).

1 Documents, testimony, information and other materials  
2 designated "ATTORNEYS' EYES ONLY" shall otherwise be subject  
3 to the same level and type of protection provided in this  
4 Protective Order for "CONFIDENTIAL" information and shall be  
5 designated in the same manner as "CONFIDENTIAL" information  
6 with the use of the words "ATTORNEYS' EYES ONLY" in place of  
7 or in addition to the word "CONFIDENTIAL."

8 6. Nothing herein shall prevent a party hereto from using  
9 documents marked "ATTORNEYS' EYES ONLY" in deposing any present  
10 employee of the party which has so marked the documents, or in  
11 deposing any past employee of the party which has so marked the  
12 documents if the past employee was an author or express  
13 recipient of the document during the time he or she was an  
14 employee of that party.

15 7. If, at any time, a party disagrees with the designation of a  
16 document or other information as "CONFIDENTIAL" or "ATTORNEY'S  
17 EYES ONLY" and protected by this Order, the parties must first  
18 attempt to resolve the dispute by conferring pursuant to Rule  
19 26. Failure to challenge a designation shall not constitute  
20 an admission that such designation is appropriate. If the  
21 dispute is not resolved through the conference process, then  
22 the designator will have fourteen (14) days to move the Court  
23 for protection. As provided in Rule 26(c), the burden of  
24 establishing that any information or material should be  
25 designated and treated as "CONFIDENTIAL" shall be on the party  
26 seeking to uphold the designation. Any disputed document or

1 information will be treated as protected under this Order  
2 unless and until the Court enters an order otherwise, or until  
3 the time period for seeking such a ruling expires.

4 8. Under no circumstances, other than those specifically provided  
5 for in this AGREEMENT or subsequent agreement or a court order  
6 or with the explicit consent in writing of the producing party  
7 with respect to specifically identified CONFIDENTIAL MATERIALS,  
8 shall CONFIDENTIAL MATERIALS or their contents in any way  
9 whatsoever be revealed, published, disclosed or otherwise made  
10 known to persons other than the following:

- 11 a. the parties to this action;
- 12 b. inside and outside counsel for the parties, as well as  
13 their employees assisting with this action;
- 14 c. outside photocopying, data processing, graphic production  
15 services or other vendors retained by counsel for a Party  
16 to assist in this litigation;
- 17 d. experts or consultants retained in good faith to assist  
18 counsel in this litigation, but only upon the prior  
19 execution of an agreement to be bound by this AGREEMENT  
20 in the form attached hereto as Appendix A;
- 21 e. court reporters who record testimony taken in the course  
22 of this litigation;
- 23 f. the Court, pursuant to paragraph 9 of this AGREEMENT; and
- 24 g. any deponent or witness to whom counsel for a Party  
25 determines in the exercise of judgment reasonably  
26 exercised disclosure is necessary for the prosecution or

1 defense of this litigation, including preparation for  
2 deposition or other testimony, provided that prior to  
3 disclosure, such deponent agrees in writing to be bound  
4 by the terms of this Order.

5 9. Any deposition or portion thereof during which Information  
6 designated as "CONFIDENTIAL" or "ATTORNEY'S EYES ONLY" is being  
7 disclosed by any party shall be taken as if in camera without  
8 any persons in attendance other than the deposition witness,  
9 and those identified in paragraph 8. The court reporter shall  
10 be provided with a copy of this Amended Protective Order.

11 10. Each person given access to the CONFIDENTIAL MATERIALS pursuant  
12 to paragraph 8 of this AGREEMENT shall be advised by counsel  
13 for the party giving access that the material or information  
14 is subject to the terms of this AGREEMENT and may not be  
15 disclosed other than pursuant to the terms thereof.

16 11. Prior to disclosure of the CONFIDENTIAL MATERIALS to the  
17 parties in this action, counsel for the party seeking to make  
18 such disclosure shall provide to its client(s) a copy of this  
19 AGREEMENT and explain the terms and conditions thereof.

20 12. Prior to disclosure of CONFIDENTIAL MATERIALS to any of the  
21 persons described in paragraph 8(c), (d), and (g) of this  
22 AGREEMENT, such persons shall first: (i) read this AGREEMENT;  
23 and (ii) sign a copy of the Confidentiality Agreement, attached  
24 as Appendix A to the original joint motion for entry of a  
25 stipulated protective order, ECF No. 101-1, at 15-17, thereby  
26 becoming subject to this AGREEMENT. Copies of the signed

Confidentiality Agreement are to be retained by counsel for the party making the disclosure. In addition, upon request, but no later than thirty (30) days following a final resolution of this action, persons described in paragraph 7(c), (d) and (g) of this AGREEMENT must promptly return all CONFIDENTIAL MATERIALS to the producing party.

13. In the event that counsel for any party files with this Court any CONFIDENTIAL MATERIALS or any papers containing or making reference to such material or information, such documents, or the portions of them that contain CONFIDENTIAL MATERIALS, shall be filed in a sealed envelope on which substantially the following statement shall be endorsed:

**FILED UNDER SEAL**  
**CONFIDENTIAL**

**This envelope contains documents that are subject to a Stipulated Agreement Governing Confidential Material entered in this action.**

14. All such material so filed shall be maintained by the Clerk of the Court separate from the public records in this action and shall be released only upon Order of the Court.
15. Entering into, agreeing to and/or producing or receiving materials or otherwise complying with the terms of this AGREEMENT shall not:
- a. prejudice in any way the rights of a party to object to the future production of documents it considers not subject to discovery;
  - b. prejudice in any way the rights of a party to attempt to

1 introduce into evidence the CONFIDENTIAL MATERIALS,  
2 subject to any and all objections made thereto;

3 c. prejudice in any way the rights of a party to apply to  
4 the Court for a protective order or an in camera  
5 inspection relating to any CONFIDENTIAL MATERIALS or  
6 other discovery materials; or

7 d. prejudice in any way the rights of a party to apply to  
8 the Court at any time for an order removing a party's  
9 confidential designation.

10 16. This AGREEMENT has no effect upon, and its scope shall not  
11 extend to, a party's use of its own CONFIDENTIAL MATERIALS.

12 17. Counsel for the parties will maintain, for in camera inspection  
13 by the Court, copies of all Confidentiality Agreements signed  
14 pursuant to the provisions of this AGREEMENT.

15 18. The inadvertent production of CONFIDENTIAL MATERIALS subject  
16 to the attorney-client, work-product or other privilege or  
17 doctrine shall not waive any such privilege or doctrine. In  
18 addition, the fact that privileged CONFIDENTIAL MATERIALS were  
19 inadvertently produced shall not be used in any manner to  
20 support a claim of waiver. Upon receiving notice from a party  
21 that privileged or otherwise protected CONFIDENTIAL MATERIALS  
22 have been inadvertently produced, any person or entity  
23 receiving such CONFIDENTIAL MATERIALS shall return them and all  
24 copies, and all documents or other material containing all or  
25 any portion of information contained in or derived from such  
26 CONFIDENTIAL MATERIALS shall be destroyed, within seven (7)



1 business days to the producing party, unless the receiving  
2 party intends to challenge the producing party's claim(s) of  
3 attorney-client, work-product or other privilege or doctrine.  
4 If the receiving party intends to challenge the producing  
5 party's claim(s) the receiving party nevertheless shall treat  
6 the CONFIDENTIAL MATERIALS as confidential, subject to this  
7 Order, and may not use the CONFIDENTIAL MATERIALS for any  
8 purpose other than making a motion to the Court that challenges  
9 the producing party's claim(s) of attorney-client, work-product  
10 or other privilege or doctrine.

- 11 19. The inadvertent failure by a Party to designate CONFIDENTIAL  
12 MATERIALS as "CONFIDENTIAL" shall not be a waiver of such  
13 designation provided that the party who fails to make such  
14 designation informs the receiving party within seven (7)  
15 business days from when the failure to designate first became  
16 known to the producing party. The party receiving CONFIDENTIAL  
17 MATERIALS that the producing party inadvertently failed to  
18 designate as "CONFIDENTIAL" shall not be in breach of this  
19 Order for any use made of such information before the receiving  
20 party is informed of the inadvertent failure to designate  
21 pursuant to this Paragraph. Upon receipt of such notice, the  
22 receiving party shall immediately take reasonable steps to  
23 ensure that any CONFIDENTIAL MATERIALS disclosed to persons or  
24 entities not authorized to receive it pursuant to this Order,  
25 and all copies thereof, are retrieved and secured as required  
26 by this Order, and that the unauthorized persons or entities

1 provided with such CONFIDENTIAL MATERIALS agree, in writing,  
2 to be bound by the provisions of this Order.

3 20. In the event additional parties to this litigation desire to  
4 have access to the CONFIDENTIAL MATERIALS, neither such parties  
5 or their counsel or their experts or consultants retained to  
6 assist said counsel shall have access to the CONFIDENTIAL  
7 MATERIALS until said party or their counsel has executed and  
8 filed with the Court a copy of this AGREEMENT, and has served  
9 a copy of same on all counsel of record.

10 21. After the termination of this proceeding, this AGREEMENT shall  
11 continue to be binding upon the parties hereto and their  
12 successors and assigns, and upon all persons to whom the  
13 CONFIDENTIAL MATERIALS has been disclosed or communicated and  
14 the parties hereto agree that the Court shall retain  
15 jurisdiction over the parties for enforcement of its  
16 provisions.

17 22. Subject to the proviso contained in this Paragraph, upon  
18 conclusion of this litigation, all the CONFIDENTIAL MATERIALS  
19 and all copies thereof (including copies provided to testifying  
20 or consulting experts) received by an opposing party shall  
21 either be destroyed by the receiving party or returned by the  
22 receiving party to the producing party along with an affidavit  
23 of counsel indicating that counsel has made a good faith effort  
24 to destroy or return all such CONFIDENTIAL MATERIALS, and  
25 believes in good faith that all such copies have been destroyed  
26 or returned; provided, that, notwithstanding the foregoing,

1 outside counsel for each party may retain archival copies of  
2 documents filed with the Court that contain CONFIDENTIAL  
3 MATERIALS, deposition transcripts and trial or hearing  
4 transcripts that contain CONFIDENTIAL MATERIALS, expert reports  
5 that contain CONFIDENTIAL MATERIALS, and all other work product  
6 that contain CONFIDENTIAL MATERIALS, provided such archival  
7 copies are maintained in confidence and will only be shared  
8 with that counsel's client: (a) in the event of a future  
9 lawsuit between one or more Plaintiffs and one or more  
10 Defendants, in which, notwithstanding any other provision of  
11 this Order, such CONFIDENTIAL MATERIALS may be used insofar as  
12 relevant thereto; or (b) insofar as necessary for a party to  
13 respond, in accordance with the procedures set forth in  
14 Sections 23 and 24 of this Amended Protective Order, to a  
15 subpoena or document request served in another proceeding by  
16 a non-party to this litigation. Except as provided above,  
17 neither party shall retain a copy in any form of CONFIDENTIAL  
18 MATERIALS produced by an opposing party after the termination  
19 of this litigation. The treatment accorded CONFIDENTIAL  
20 MATERIALS under this Protective Order shall survive the  
21 termination of this action.

- 22 23. If any party (or their counsel) to this action receives a  
23 subpoena or other compulsory process demanding information,  
24 documents or materials considered "CONFIDENTIAL" pursuant to  
25 this AGREEMENT, the party or counsel receiving the subpoena or  
26 other compulsory process shall give written notice of the

1 subpoena or other compulsory process to counsel for the  
2 producing party at least 14 days prior to the return date, or,  
3 if the subpoena or other compulsory process has a return date  
4 of less than 14 days, notice shall be given to the designating  
5 person by facsimile as soon as possible but in no event later  
6 than 72 hours prior to the return date.

7 24. Absent notification in writing that the producing party has  
8 taken (or intends to take) action to protect the  
9 confidentiality of the requested information, document or  
10 material, the party or counsel subject to the subpoena or other  
11 compulsory process may produce the requested information,  
12 document or material on the return date provided it makes clear  
13 that such information, documents and material were provided  
14 with the understanding that they would be maintained  
15 confidentially pursuant to this AGREEMENT.

16 25. The failure of either party to enforce any provision or  
17 provisions of this AGREEMENT shall not be in any way construed  
18 as a waiver of any such provision or provisions, nor prevent  
19 that party from thereafter enforcing each and every other  
20 provision of this AGREEMENT.

21 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order  
22 and provide copies to all counsel.

23 **DATED** this 2<sup>nd</sup> day of July 2013.

24 s/ Edward F. Shea

25 EDWARD F. SHEA

26 Senior United States District Judge

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